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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1951

No. 83

ANTONIO RICHARD ROCHIN, *Petitioner.*

VS.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR
THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

PETITIONER'S OPENING BRIEF

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SUPREME COURT OF THE UNITED STATES

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No. 83

ANTONIO RICHARD ROCHIN, *Petitioner.*

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITIONER'S OPENING BRIEF

Statement of the Case

Petitioner was accused by information of the crime of violation of Section 11500 of the California Health and Safety Code, a felony, namely, the unlawful possession of morphine. Following a trial by the court sitting without a jury, petitioner was found guilty as charged in the information, whereupon judgment was pronounced and petitioner was sentenced to the Los Angeles County Jail for a term of sixty (60) days.—The judgment of the trial court was affirmed by the California District Court of Appeal, Second Appellate District, Division III, in the case of *People v. Rochin*, 101 A. C. A. 163, 225 P.2d 1.

A petition for hearing in the Supreme Court of the State of California was denied on January 11, 1951, two justices dissenting from the Order denying a hearing.

Petition for Certiorari was filed in the Supreme Court of the United States April 9, 1951. Certiorari granted May 28, 1951. Oral Argument set for October 16, 1951.

Petitioner herein asserts that said judgment of conviction was rendered contrary to the provisions of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States, and Article 1, Section 19, of the Constitution of California, in that such judgment and conviction was based upon evidence illegally obtained by unreasonable or unlawful search and seizure and in violation of the privilege against self-incrimination.

Statement of Facts

On July 1, 1949, about 9:00 o'clock in the morning, (R. p. 8) three Los Angeles County Deputy Sheriffs assigned to the Narcotic Detail had entered a two-story dwelling house in which Antonio Richard Rochin (petitioner) resided with his family (R. pp. 7, 8, 168). The officers entered by opening a door to the stairway and had immediately gone upstairs. Mother of petitioner followed (R. pp. 169, 170). The door was forced open to petitioner's upstairs room, which door had a small hook on it. The officers kicked the door in and broke it (R. pp. 25, 161). Inside the room petitioner Rochin had been seated on a bed on which a woman named Margarita Hernandez was lying (R. p. 9, 165). Also inside the room, Deputy Sheriff Jones, from about two feet away, had seen two capsules and had asked petitioner "whose stuff is this?" Petitioner leaned over and grabbed the two capsules and placed them in his mouth (R. p. 9). Two other officers were there too (R. p. 28). Officer Jones grabbed petitioner by the throat and began to squeeze his throat. Some force was applied to his throat. He hollered a little bit (R. pp. 29, 30). There was a struggle (R. p. 34). The officers were choking petitioner hard.

Petitioner was gasping for breath (R. p. 162). The officer was watching petitioner put on his clothes, and said "Hurry up." The Officer struck petitioner on his chin for no reason at all (R. p. 163). Petitioner jumped up and put his hand up to protect himself; then the other two cops came in and jumped on top of him (R. p. 161, 163). They all jumped on top of him. Petitioner was handcuffed at the time the officer struck him (R. pp. 162, 163). From his room, petitioner Rochin had been taken to a hospital. He had handcuffs on at the time. The petitioner was strapped down to an operating table in the hospital (R. p. 35). The handcuffs were on him when he was lying on the table (R. p. 35). The officer asked the doctor to pump the stomach of petitioner. A rubber tube, approximately a foot long and a quarter of an inch in diameter or perhaps a little larger was inserted down the throat of petitioner. A white liquid solution was then poured into the tube, and into petitioner's stomach (R. pp. 37, 39). While the tube was still inserted in petitioner's throat the liquid was expelled through his mouth (R. p. 39). Approximately two inches of this white solution was seen in the pail (R. p. 40) and two objects were found in the pail. Officer Jones testified he had no knowledge concerning the contents of those two objects before they were ejected from the stomach of Rochin (R. p. 43) but they looked like capsules of heroin (R. p. 42), that narcotics usually were wrapped in this fashion or in capsule form; that the officer deduced they contained narcotics because there would be a strong suspicion on his part that they did contain narcotics (R. p. 43), because petitioner swallowed them (R. p. 43).

Chemist Crompt testified that he saw two substances which previously were wrapped in cellophane paper on July 1, 1949 (R. p. 44). That he received the same from Deputies Jones and Shelton of the Sheriff's Narcotic detail. That

the objects consisted of parts of gelatin capsules containing a brownish powder, each of the parts wrapped in a piece of cellophane. The brownish powder in each of the parts of the gelatin capsules contained the narcotic drug morphine, a derivative of opium (R. p. 45). The chemist did not know whether the capsules shown him at the trial were the same capsules he had previously tested (R. p. 58). That the evidence upon which he predicated his testimony was not in court. That the liquids and reagents involved were either poured down the sink or washed off the vessels in question (R. p. 61). In so far as the narcotics were concerned the tests change the substance to such an extent that it would be impossible to identify the substance morphine in the reagent after the test had been applied (R. p. 64). The chemist did not positively identify the two capsules (R. p. 58) but did positively identify the envelope from which they were taken (R. p. 61). Counsel stipulated that if petitioner were called as a witness he would testify that Exhibit 1, (which consisted of the substance extracted from the defendant (Rochin's) stomach (R. p. 158), were forcibly taken from him by the use of a stomach pump, without his permission or consent and against his will, wishes, and desires, leaving the determination to the court as to the veracity, weight and credibility thereof. At the trial the petitioner had taken the stand and had testified only as to his name before being excused (R. p. 171)

ARGUMENT

I.

The Arrest, Search, Seizure, and "Unlawfully Assaulting, Battering, Torturing and Falsely Imprisoning the Defendant" Violated the Substantial Rights of the Defendant as Guaranteed by the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Section 19, of the Constitution of California.

Counsel for respondent has repeatedly urged all peace officers to maintain a scrupulous regard for the rights of accused offenders, adding that any breach of those rights destroys confidence in the peace officer's work. He might add that to permit the use of evidence which is improperly procured invites and encourages law enforcement officers to violate the provisions of our Constitution and fosters the abuse by the police and other law enforcing agencies of their powers.

The nullification and deprivation of the constitutional guarantees against unlawful searches and seizures and self-incrimination can never be excused upon the grounds of urgency, necessity or expediency. While it is desirable that criminals should be detected, such purpose does not justify the sacrifice of our fundamental constitutional guarantees nor warrant the violation of the rights provided thereunder in order to obtain evidence. Unlawful search and seizure shocks the conscience of mankind and results in unfairness. It is contrary to moral law and to the spirit and aims of the Constitution of the United States.

THE VICTIM OF THE UNLAWFUL ENFORCEMENT OF THE
LAW IN CALIFORNIA HAS NO EFFECTIVE CIVIL RE-
DRESS FOR THE VIOLATION OF RIGHTS GUARANTEED
BY THE FEDERAL BILL.

It is admitted that the Fourth Amendment to the Constitution of the United States prohibits unreasonable searches and seizures by federal officers. Pursuant to this mandate the federal courts forbid the introduction in court of evidence obtained by an illegal search or seizure if a timely motion for its exclusion is made by the accused (*Byars v. United States*, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520).

We concede that the California Constitution contains an identical provision (*Cal. Const. Art. I, sec. 19*), but in holding that the Fourth Amendment binds the States but not their courts or law enforcement officers, the majority in *Wolf v. Colorado, supra*, found some justification for their conclusion in the assumed civil remedy of damages available to the victim. In their dissents, Justices Murphy, Rutledge and Douglas emphasized the insufficiency, if not futility, of such remedy where available at all. In *People v. Rochin, supra*, the Appellate Court also assumed the availability to the defendant of an action for damages for assault and battery against the deputy sheriffs and police surgeon who participated in pumping the former's stomach for evidence. While the California Supreme Court denied a hearing, the same cannot be regarded as its approval of the suggested civil remedy in view of its other decisions upon the subject.

Aside from the practical difficulties pointed out by the dissenters in *Wolf v. Colorado, supra*, there are two other escapes for the errant officer in California:

(1) In all of the heavily populated cities and counties the offices of chief of police and sheriff are under civil service regulations governing the choice of deputies and

policemen. That is uniformly held to relieve the principals from liability under the doctrine of *respondeat superior* for the torts of their deputies and officers unless the principal personally directs or participates in the tort. As emphasized by the dissenters in *Wolf v. Colorado*, *supra*, a damage judgment in such case is frequently not collectible even from the principal.

See:

Michel v. Smith, (1922) 188 Cal. 199.

Van Vorce v. Thomas, (1937) 18 Cal. App. 2d, 723, 724.

Shannon v. Fleishhacker, (1931) 116 Cal. App. 258.

Abrahamson v. Ceres, (1949) 90 Cal. App. 2d 523, 526, of *Fernelius v. Pierce*, 22 Cal. 2d 226.

(2) The most serious difficulty is the doctrine of official immunity evolved from the ancient heresy that "the King can do no wrong." The federal courts have immunized most federal officers, deputies and employees from liability for false arrest, imprisonment and malicious prosecution. California has now extended that doctrine to exempt an "inspector" of the fish and game commission and the immunity encompasses any officers acting within the scope of his duty. The court said:

"When the duty to investigate crime and to institute criminal proceedings is lodged with *any* public officer, it is for the best interests of the community as a whole that he be protected from harassment in the performance of that duty." *White v. Towers*, (Sept. 4, 1951) 37 A. C. 734, 737, 740 (In Bank).

Civil redress for false arrest, imprisonment and malicious prosecution emerges from the freedoms of life, liberty and security guaranteed by the fundamental law. (*Jaffe v. Stone*, 18 Cal. 2d 146). The California court's position in *White v. Towers*, *supra*, is based upon the "power" of statism against which the three dissenters rebelled in that

case and to limit which the Bill of Rights was adopted. If peace officers, their deputies, clerks and employees are immune for wrongfully abridging the citizen's liberty, the same reasoning exempts them from liability for violating his rights of personal security and privacy by extracting evidence from individual by force or terrorism and the California Supreme Court, in its current constituency, would probably so hold.

The majority, in the *White v. Towers* case, *supra*, having judicially legislated the civil remedy out of our jurisprudence, feel that public policy will be best subserved by "remanding the offended individual to his remedy under the penal statutes."

In his powerful dissenting opinion in that case Mr. Justice Carter said:

"I should like to have brought to my attention any such case where a plaintiff has been successful, or even where a prosecution has been instituted. It is absurd to suggest that any district attorney, or superior officer, is going to take criminal action against one of his subordinates at the request of one injured by an unwarranted prosecution, especially where the prosecutor has relied upon the testimony of the subordinate as a basis for the prosecution. * * * One has only to read the cases cited by the majority to see how the doctrine has been so unnecessarily stretched and expanded to cover almost any type of employee."

The criminal remedy, if miraculously made available, would not compensate the victim's loss of reputation and expense of defending himself against the unwarranted charges. (Citing *People v. Rochin*, 101 Cal. App. 2d 140 (225 P. 2d 1, 913), (cert. granted).

It would seem then that California has now deprived the citizens of all civil redress for the violation of their persons,

liberty and security if the offender acted officially, and in this state, a peace officer is supposed to be constantly "on duty," and the demands of official power appear to transcend the mere rights of man. This decision restores no personal liberty, is a stepping-stone to the use of further power by officers.

Older than Kipling's dak bungalows is the idea that one must not break into another's house. In The Bible, the Book of Deuteronomy (Chapter 24), we find:

"(10). When thou dost lend thy brother anything thou shalt not go into his house to fetch his pledge.

"(11). Thou shalt stand abroad, and the man to whom thou dost lend shall bring out the pledge abroad unto thee."

We must not sit idly by and permit the California courts to block the ideals and achievements of the Federal Bill of Rights. It is a challenge in these days of crisis and decision, when tension is as tight as a violin string. We must find our way out of this jigsaw puzzle.

In *Brown v. Miss.* (297 U. S. 278, 285, 56 S. Ct. 461, 465), recently quoted in *Lynch v. U. S.* (189 F. 2d 476), we find:

"Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which (the Constitution of the United States) guarantees him."

II

The Extortion of Testimony from a Defendant by Physical Torture and the Use and Receipt of Such Evidence in Trial Proceedings Is a Violation of the Privileges and Immunities Guaranteed by the Fourth, Fifth and Fourteenth Amendments.

Constitutional Provisions and Statutes Involved

The essential portions of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States involved in these proceedings are as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (*Fourteenth Amendment*, Sec. 1.)

"The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall be issued but upon probable cause submitted, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized." (*Fourth Amendment*)

Section 19, Article I, Constitution of California, provides identically the same as the Fourth Amendment of the Constitution of the United States.

The Fifth Amendment of the Constitution of the United States provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law." (*Sec. 13, Article I, Constitution of California*.)

With the heightening of international tensions, citizen interest centers increasingly on the vital question of how we can preserve our civil liberties while safeguarding the national security. This cannot be done if we permit decisions, such as in the instant case, to go unchallenged. Thus we are attempting to write a brief which will give the reader some element of hope that such a decision will not be allowed to stand.

Among the purposes and principles of the Charter of the United Nations we find:

"Article I

"1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;" and

"3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;" and in "Article 13, * * * (b) promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Thus we find in the Charter of the United Nations international recognition of need for adequate protection of fundamental human rights. We dare to give open voice to the cry for the preservation of such freedoms. Millions of

Americans will watch with interest the coming decisions of this high court.

Petitioner continues to urge that the forced pumping of his stomach constituted an invasion of his privilege against self-incrimination in violation of Article I, Section 13, of the California Constitution and the Fifth Amendment to the Federal Constitution.

Article I, Section 13, of the California Constitution provides in part:

"... No person shall ... be compelled in any criminal case, to be witness against himself; ..."

The Respondent contends that the privilege against self-incrimination extends only to testimonial evidence but does not include forced physical disclosures.

THE COERCIVE STOMACH PUMPING OF DEFENDANT WITHOUT HIS CONSENT TO OBTAIN EVIDENCE AGAINST HIM WOULD COMPEL HIM TO BE A WITNESS AGAINST HIMSELF IN VIOLATION OF THE FOURTEENTH AMENDMENT AND ARTICLE I, SEC. 13, CALIFORNIA CONSTITUTION, WHERE THE RESULTS OF SUCH EXAMINATION ARE ADMITTED IN EVIDENCE.

(1) It is now settled beyond cavil that a conviction in a criminal trial obtained by compelling an accused to be a witness against himself without his consent cannot stand against the Fourteenth Amendment, whose guarantee of due process includes by implication the guarantee against compelling an accused to incriminate himself in the Fifth Amendment. It is correspondingly settled that, independently of Art. I, Sec. 13, *supra*, the federal guarantee is binding upon the States and that evidence so procured is inadmissible.

The courts have jealously guarded the guarantee against self-incrimination by excluding evidence obtained by physically mistreating the accused, (*People v. Williams* ('42)

(20 Cal. 2d 273, 285); and where a later confession is influenced by threats inducing a prior one (*People v. Jones* ('44) 24 Cal. 2d, 601, 609). And the torture or abuse may render it involuntary where consisting of a threat to confine the defendant's mother (*People v. Mellus* ('33) 134 Cal. App. 219), for no court should countenance the use of a confession which was made under the influence of either threats or inducement." *People v. Rogers* ('34) 22 Cal. 2d 787, 805.)

While in his own home, this Mexican youth, who had served his country, was the subject of an attack. The door to his room broken in, to reach him, he was choked and struck. With three officers in his bed-room there can be no doubt but that he was afraid to make further protest of the treatment he received.

Can it be said that a man being handcuffed, strapped to a table, with a rubber tube in his throat and liquid being poured into his stomach was in any position to defend himself? Because he did not gurgle out "stop it"—did not use his voice, the evidence is admissible. We dispute that view of the law.

After determining that the evidence, though illegally obtained in violation of the State and Federal Constitutions, nevertheless held it admissible in evidence in a criminal trial. The District Court of Appeal made the following observation:

"Although the statements made hereinabove are sufficient for the decision herein, it should be stated that the rules of evidence which we are following must not be regarded by police officers and others as a license to indulge in lawless acts. This court does not approve the conduct of deputy sheriff Jack Jones and deputies Smith and Shelton who were with him at defendant's home. Under the record here, deputy Jack Jones and the alleged doctor of medicine, Mier, were guilty of

unlawfully assaulting, battering, torturing, and falsely imprisoning the defendant at the alleged hospital. A remedy of defendant for such highhanded and reprehensible conduct is an action for damages. (This decision was rendered prior to the decision of *White v. Towers*, rendered Sept. 4, 1951, 37 A. C. 734)

It would appear that the sheriff should review the qualifications of said deputies to be entrusted with the authority of public office. Also it would appear that the qualifications of said Mier as an ethical doctor of medicine should be reviewed.

In a concurring opinion by Mr. Justice Vallee, the court went on to observe:

*"... To me, the record in this case reveals a shocking series of violations of constitutional rights. I am in entire agreement with the views expressed by Mr. Justice Carter in his dissent in *People v. Gonzales*, 20 Cal. 2d 165, 174. However, as a member of an intermediate reviewing court, I am bound by the decisions of the Supreme Court which, unfortunately, have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts. For that reason only, I concur in the judgment." (Italics ours.)*

Although the Supreme Court of California denied the petition for a hearing in that Court, the dissenting opinions by Justices Carter and Schauer give their version of the record and constitutional violations and questions involved. The entire opinions we considered to be of so much importance that we set forth the same in full and attached the opinions and authority cited as Exhibit "B" to our Petition for Writ of Certiorari.

The opinion of Mr. Justice Schauer, concurred in by Mr. Justice Carter, is as follows:

"People v. Rochin (a Crim. 4452) 101 Cal. App. 2d 140, (225 P. 2d 1, 913) (cert. granted).

Dissenting Opinion on Denial of Petition for Hearing

"I dissent from the order denying the petition for hearing. In my opinion a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse.

"To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extra-judicial confession which is used as evidence in the courtroom.

"A trial dominated by mob violence in the courtroom is not such as due process demands. The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession.

"If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used at the trial.

"The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence" (*Lisenba v. California* (1941), 314 U. S. 219, 237.)

"In *People v. One 1941 Mercury Sedan* (1946), 74 Cal. App. 2d 199, 213, where law enforcement officials assaulted and battered accused, compelling him to vomit an incriminatory substance, the court said that the privilege against self-incrimination "protects the accused from the process

of extracting from his own lips against his will an admission of guilty, but it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material. (Italics ours.) The privilege is aimed at preventing the compulsory oral examination of the accused before or during trial. Experience of many years has demonstrated that when statements are extorted from an accused there is strong likelihood that the extorted evidence would be unreliable. But the reason for the rule no longer exists when physical evidence is considered." This reasoning appears to ignore a problem more basic and more important in legal concept than the question of the actual guilt or innocence of the accused. We are not concerned here merely with a rule designed to exclude untrustworthy evidence; we are, or should be, as in the situations described in the above quotation from the *Lisenba* case, concerned with the fundamental concept of *due process*. The requirements of due process are just as applicable to the guilty as to the innocent.

"The privilege against self-incrimination protects a guilty person from being required, by orderly process, to answer questions on the ground that such answers might furnish 'a link in the chain of evidence needed in a prosecution.' (*Blau v. United States* (1950), 340 U. S. 159, 19 L. W. 4062.) The person who claims this privilege before a grand jury or a court has the opportunity to establish his right to remain silent by litigation. The defendant here had no such opportunity. Without a warrant the officers broke into his room; they assaulted and battered defendant and took him away by force; by further force he was compelled to vomit and thus to produce evidence against himself. Had the evidence forced from defendant's lips consisted of an oral confession that he illegally possessed a drug, then, even though the sheriffs by physical violence had deprived him

of his privilege against self-incrimination, he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the people of this state are permitted to base a conviction upon it. I find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse."

III

The Physical Abuse and Forcible Extraction of Evidence by the Employment of Coercive Methods To Extract Evidence from the Body of the Defendant by the Use of a Stomach Pump and Chemicals without the Defendant's Consent Compelled Him to Be a Witness Against Himself in Violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States, and the Admission of Such Evidence So Obtained to Secure His Conviction Was a Violation of the Defendant's Constitutional Rights.

Respondent relies on the appellate court decision in the case of *People v. One 1941 Mercury Sedan*, supra, on pages 202, 203 of said opinion, to the effect that:

"The privilege protects the accused from the process of extracting from his own lips against his will an admission of guilt, but it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material."

We respectfully submit that this is not a complete answer to our contention. There is always occasion to ponder judicial constitutional interpretations, "since," as said by the late Chief Justice Stone, "they were beyond legislative correction, could not be taken as the last word" but are "open to reconsideration, in the light of new experience

and greater knowledge and wisdom." In an era where the highest courts in the land have reversed themselves in "fundamentals" more in a decade than in their entire prior history, it is equally essential that incidental, dependent questions dependent upon constitutional views which have changed be similarly reexamined lest we fall into the error described by Holmes as a "blind worship of the past", the reason for whose rules have long ceased to exist. It is inevitable that the law be changed.

As Mr. Justice Roberts says in *Snyder v. Massachusetts*, 291 U. S. 97 at 137, the Court said:

"A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way.

"PROCEDURAL DUE PROCESS HAS TO DO WITH THE MANNER OF THE TRIAL: DICTATES THAT IN THE CONDUCT OF JUDICIAL INQUIRY CERTAIN FUNDAMENTAL RULES OF FAIRNESS BE OBSERVED: FORBIDS THE DISREGARD OF THOSE RULES, AND IS NOT SATISFIED, IF, THOUGH THE HEARING WAS UNFAIR, THE RESULT WAS JUST."

and, in that case, the Court further stated:

"Due process of law required that the proceeding shall be fair, but fairness is a relative, not an absolute concept * * * What is fair in one set of circumstances may be an act of tyranny in others."

How, then, can any defendant accused of a crime have a fair trial if evidence may be extracted from his body and used to convict him.

In *Boyd v. United States*, 116 U. S. 616, the Court said:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

If it be the law of California that the "accused is protected from the process of extracting from his own lips against his will an admission of guilt," but that you may reach into his body, by means of a rubber hose, liquid solution, or in some other manner and secure evidence to convict him, then such law should be distinctly, directly and immediately changed.

IV

The State Court's Use of Evidence So Illegally Obtained, Is a Violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and in Violation of the Bill of Rights, Which Is Binding upon the States.

It would serve no practical purpose to reiterate the contentions set forth elsewhere in this brief, therefore and to shorten this brief, we include under the above caption those cases cited which embrace the points raised. We hold to the theory that the Bill of Rights is a minimum point as to guarantee and that no court may go beyond that line of demarcation and take away any right guaranteed thereby. There are other rights and privileges which we may enjoy but there can be no reduction of the rights set forth in the cited Amendments to the Constitution of the United States. These rights the courts must enforce because they are basic to our free society.

Wise and humane courts, consecrated to the cause of freedom and justice, may discover new tyrannies which they ought to construe "due process" against. Never can they be justified in condoning what the Bill of Rights condemns.

In condoning the admission of illicit evidence in the state prosecution in *Wolf v. Colorado*, (338 U. S. 25, 269 S. Ct. 1359, 93 L. Ed. 1782) the court was apparently unmindful that the perversion of the Constitution encouraged the very conspiracies between federal and state officers to use the latter as fronts to commit unlawful searches and seizures as is condemned by it in *Lustig v. U. S.*, (93 L. ed. 1369). This lack of practical conception challenges the wisdom of discarding the Bill of Rights as minimum requirements of a "fair trial" and entrusts the same to the vicissitudes of a trial court.

V.

The Fundamental Right Guaranteed by the Bill of Rights and the Constitutional Provisions to a Defendant in a Criminal Action to be Secure in His Person or to be a Witness Against Himself, and to the Right of Due Process and Equal Protection of the Laws, Protects Him from Being a Witness Against Himself in Any Federal or State Court and Assures Him of a Fair and Impartial Trial.

In *Brown v. Mississippi*, 297 U. S. 278, 285 it was said: "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' following the statement in *Snyder v. Massachusetts*, 291 U. S. 97, 105.

The due process clause forbids compulsion to testify by fear or hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process. Although 'exhaustion' in some cases resulted from prolonged inquisition without physical violence or express threat thereof, the stomach is also physically 'exhausted' when it yields to the pressure of a pump to remove its contents.

While the guaranty is ordinarily invoked against involuntary confessions, its language does not so limit it.

The Supreme Court of Missouri, in *State v. Matsinger*, 180 S. W. 856, 858, said:

"When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right." (See, also, *State v. Horton*, 247 Mo. 657, 153 S. W. 1051, 1053.)

The evidence is inadmissible under the *federal rule* and is plainly inadmissible under the *state rule* because the evidence was obtained against his will and without his consent, by force and fear, thus in violation of the Fourteenth Amendment of the U. S. Constitution and Art. 1, Section 13, of the California Constitution. The evidence was not obtained as an incident of a lawful arrest of the petitioner.

It is also significant to note that not less than 30 States have adopted rules excluding evidence so obtained in violation of the constitutional guarantee. As of today 30 States reject the doctrine found in the case of *Weeks v. United States*, (1913) (232 U. S. 383, 58 L. ed. 652) and 17 States are in agreement with it. Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible.

The increasing number of cases reported in the appellate courts which involve violation of the constitutional guarantees in question is appalling. But there are infinitely more of such cases which never reach an appellate court. There are many others in police and municipal courts where decisions on appeal to superior courts are not reported. When peace officers are so exposed on an appellate record, the attorney general and district attorney invariably appeal to expediency and lament their impotency against organized crime.

Contrary to the Federal Court rule excluding evidence obtained contrary to the Fourth Amendment (*Weeks v. U. S.*, *supra*) and despite *Wolf v. Colorado* (1948) 338 U. S. 25, holding that the latter guarantees "fundamental" rights of personal security and privacy that bind the States, and that the 14th Amendment requires local courts to enforce all "fundamental" rights essential to a fair trial, our

appellate courts have persistently followed the prohibition era case of *People v. Mayen* (1922) 188 Cal. 237, which held that state courts and officers are beyond the reach of the Federal Bill of Rights and are free to adopt the rule admitting such evidence at common law—a barbarous, despotic practice which occasioned adoption of the Fourth Amendment! *Boyd v. U. S.* (1886) 116 U. S. 616. Some of the ablest jurists in the past 25 years have rejected the Mayen heresy.

Drop the bars at any place, deny equality to any man or race, and all liberty is jeopardized.

VI

The Guarantee of Personal Security in the Fourth Amendment Is a Bar Against Federal and State Abridgement Whose Preservation Requires That It Be Not Subverted by Sanctifying the Evidentiary Spoils of Its Defilement by Permitting the Admission and Use of Evidence Obtained in Violation Thereof in any Criminal Proceeding in State and Federal Courts.

What any unlawful enforcement of the law does is but the terming not only of constitutional government, but of the living faith of mankind in free institutions. The depth and range of this evil, all the more portentous when sanctioned by judicial subtlety and a leaning toward permitting evidence to be admitted, no matter how obtained, shocks us. Are we going to permit this trend to continue? Mere words cannot give adequate expression to our feeling that we must be alert. We must not allow this curtailment of our liberty.

VII

The Guarantee of Fundamental Human Rights in the Federal Bill, as "the Supreme Law of the Land," Is of Necessity Binding upon the National and State Governments Alike.

Supreme Law of the Land

The Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the supreme law of the land.

In 1925, *Pierce v. Society of Sisters*, 268 U. S. 510, held freedom of conscience a fundamental liberty. In the light of the present decisions, the courts have unequivocally determined that certain personal liberties and rights are inalienable to Americans and are so guaranteed by the "supreme law" against aggression by Nation or States. It appears to the writer that the supremacy of the Federal Constitution (Art. VI) is enough to make every guarantee of its Bill of Rights the "law of the land", protected by "due process", albeit there may be other freedoms not explicit therein.

VIII

The Fundamental Right to Security as Guaranteed by the Constitution of the United States Demands That any Evidence Procured in Violation Thereof Be Excluded under the Guarantees Which Protect an Accused from Being a Witness Against Himself and to the Due Process of Law as Guaranteed by the Federal Constitution.

Stages at Which the Federal Constitutional Questions
Were Raised

The defendant raised the violation of the constitutional questions involved herein during the following stages of the proceedings:

(1) During the trial the defendant objected to the introduction of the evidence as having been secured in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and in violation of Article I, Section 19, of the Constitution of California.

(2) At the close of the People's case during the course of the trial, the defendant moved to dismiss the proceedings on the ground that the evidence constituting the *corpus delicti* was illegally and unlawfully obtained in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Sec. 19, of the Constitution of California.

(3) At the termination of the trial, the defendant raised the question of the violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Section 19, of the Constitution of California.

(4) On appeal to the District Court of Appeal of the State of California, Second Appellate District, Division III, in Crim. No. 4452, the appellant raised the foregoing constitutional questions.

(5) On the petition for hearing in the Supreme Court of California, petitioner raised the foregoing constitutional questions.

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE TRIAL IN THIS CASE CONSTITUTED FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Questions Presented by This Petition

We contend:

I

THE ARREST, SEARCH, SEIZURE, AND "UNLAWFULLY ASSAULTING, BATTERING, TORTURING AND FALSELY IMPRISONING THE DEFENDANT" (See Opinion of the District Court of Appeal, Exhibit "A" in Petition for Writ of Certiorari, and herein) VIOLATED THE SUBSTANTIAL RIGHTS OF THE DEFENDANT AS GUARANTEED BY THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 19, OF THE CONSTITUTION OF CALIFORNIA.

II

THE EXTORTION OF TESTIMONY FROM A DEFENDANT BY PHYSICAL TORTURE AND THE USE AND RECEIPT OF SUCH EVIDENCE IN TRIAL PROCEEDINGS IS A VIOLATION OF THE PRIVILEGES AND IMMUNITIES GUARANTEED BY THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

III

THE PHYSICAL ABUSE AND FORCIBLE EXTRACTION OF EVIDENCE BY THE EMPLOYMENT OF COERCIVE METHODS TO EXTRACT EVIDENCE FROM THE BODY OF THE DEFENDANT BY THE USE OF A STOMACH PUMP AND CHEMICALS WITHOUT THE DEFENDANT'S CONSENT COMPELLED HIM TO BE A WITNESS AGAINST HIMSELF IN VIOLATION OF THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AND THE ADMISSION OF SUCH EVIDENCE SO OBTAINED TO SECURE HIS CONVICTION WAS A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

IV

THE STATE COURT'S USE OF EVIDENCE SO ILLEGALLY OBTAINED IS A VIOLATION OF THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND IN VIOLATION OF THE BILL OF RIGHTS, WHICH IS BINDING UPON THE STATES.

V

THE FUNDAMENTAL RIGHT GUARANTEED BY THE BILL OF RIGHTS AND THE CONSTITUTIONAL PROVISIONS TO A DEFENDANT IN A CRIMINAL ACTION TO BE SECURE IN HIS PERSON OR TO BE A WITNESS AGAINST HIMSELF, AND TO THE RIGHT OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, PROTECTS HIM FROM BEING A WITNESS AGAINST HIMSELF IN ANY FEDERAL OR STATE COURT AND ASSURES HIM OF A FAIR AND IMPARTIAL TRIAL.

VI

THE GUARANTEE OF PERSONAL SECURITY IN THE FOURTH AMENDMENT IS A BAR AGAINST FEDERAL AND STATE ABRIDGEMENT WHOSE PRESERVATION REQUIRES THAT IT BE NOT SUBVERTED BY SANCTIFYING THE EVIDENTIARY SPOILS OF ITS DEFILEMENT BY PERMITTING THE ADMISSION AND USE OF EVIDENCE OBTAINED IN VIOLATION THEREOF IN ANY CRIMINAL PROCEEDING IN STATE AND FEDERAL COURTS.

VII

THE GUARANTEE OF FUNDAMENTAL HUMAN RIGHTS IN THE FEDERAL BILL, AS "THE SUPREME LAW OF THE LAND," IS OF NECESSITY BINDING UPON THE NATIONAL AND STATE GOVERNMENTS ALIKE.

VIII

THE FUNDAMENTAL RIGHT TO SECURITY AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES DEMANDS THAT ANY EVIDENCE PROCURED IN VIOLATION THEREOF BE EXCLUDED UNDER THE GUARANTEES WHICH PROTECT AN ACCUSED FROM BEING A WITNESS AGAINST HIMSELF AND TO THE DUE PROCESS OF LAW AS GUARANTEED BY THE FEDERAL CONSTITUTION.

Conclusion

However wide discretion is left to the state, it cannot use a procedure such as was followed in the instant case, to convict a youth. It matters not whether the officers were city, county or state, it would be offensive to the very concept of justice which is inherent in our institutions. The intrinsic fairness of such criminal process is involved in this case.

We believe that the State Court's use of evidence in the Rochin case violated the Fourth Amendment of the United States Constitution and was based upon the erroneous assumption that the Federal Bill of Rights is not binding upon the several States. We hold to the belief that the fundamental right of security of a person requires that any evidence procured in violation of such amendment should be excluded under the guarantees which protect an accused from being a witness against himself in either a Federal or State court and that every person should be assured of a fair trial.

The rule adopted in *People v. Mayen*, (188 Cal. 236) should be held to be unconstitutional for the reasons set forth in this brief.

It is imperative that the California type of justice be lifted and placed on a higher level. It must be more consistent with right living and fairness. We must not remain tied to the past, either in law or conduct, unless it be good. The unfair Mayen decision mocks justice. The pendulum has swung too far toward the disregard of the rights and freedoms guaranteed by the United States Constitution. It should swing the other way—toward real justice.

The writer expresses her appreciation to Attorney William C. Ring for contributing some of the material herein.

DOLLY LEE BUTLER,
Attorney for Petitioner.

Dated at Los Angeles, California,
September 19, 1951.

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